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8 UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON

9 MANDY RAE FOULKS,

10 Plaintiff,

11 v.

12 NANCY A. BERRYHILL, Acting  
13 Commissioner of the Social Security  
Administration,

14 Defendant.  
15

CASE NO. 2:16-cv-01405 JLR-JRC

REPORT AND RECOMMENDATION  
TO DISMISS FOR FAILURE TO  
COMPLY WITH THE COURT'S  
SCHEDULING ORDER AND FOR  
LACK OF PROSECUTION

NOTED FOR: JUNE 2, 2017

16 This matter has been referred to United States Magistrate Judge J. Richard  
17 Creatura pursuant to 28 U.S.C. § 636(b)(1) and Local Magistrate Judge Rule MJR  
18 4(a)(4), and as authorized by *Mathews, Secretary of H.E.W. v. Weber*, 423 U.S. 261,  
19 271-72 (1976). This matter is before the Court on this Court's Order to Show Cause why  
20 this matter should not be dismissed for failing to follow the Court's Scheduling Order  
21 (*see* Dkt. 16).  
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1 This Court issued the Order to Show Cause why this matter should not be  
2 dismissed (Dkt. 16) on April 5, 2017, ordering plaintiff to file her opening brief or show  
3 cause by April 21, 2017 why this matter should not be dismissed for lack of prosecution.

4 Plaintiff has failed to file anything in response to this Court's Order. For this  
5 reason, this Court recommends that this action be dismissed without prejudice.

#### 6 BACKGROUND

7 Plaintiff's Motion for Leave to Proceed *in Forma Pauperis* was granted and her  
8 Complaint was filed on September 7, 2016. Dkts. 1-3. The Court directed service of the  
9 Summons and Complaint pursuant to General Orders 04-15 and 05-15 on September 7,  
10 2016. *See* Dkts. 5, 6. The defendant filed the Answer/Administrative Record on  
11 November 7, 2016. Dkt. 11.  
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13 The Court's initial Scheduling Order, (Dkt. 12), was dated and mailed to plaintiff  
14 on November 9, 2016. This Order directed plaintiff to file an opening brief on or before  
15 December 12, 2016. *See id.* Plaintiff filed a motion for continuance of the scheduling  
16 order on December 8, 2016 (Dkt. 13) and the Court granted plaintiff's motion. Dkt. 14.  
17 Plaintiff's opening brief then was due on or before January 20, 2017. *See id.* Plaintiff  
18 failed to file an Opening Brief. Defendant Acting Commissioner filed a responsive brief  
19 "[o]ut of abundance of caution." Dkt. 15. The Order to Show Cause was filed and mailed  
20 to plaintiff on April 5, 2016. Dkt. 16. This Order stated in part:  
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22 (1) Mandy Rae Foulks, plaintiff, must submit to the Court by  
23 **April 21, 2017** a brief explaining what the ALJ did wrong, with citations  
24 to the Administrative Record; what evidence supports plaintiff's position;  
and why the ALJ's error was harmful, and also must follow the  
requirements noted in the Scheduling Order (*see* Dkt. 12).

1 (2) If plaintiff does not file or cannot file a brief, she must  
2 explain why the case should not be dismissed for failing to follow the  
3 Court's scheduling order. She must submit this explanation to the Court  
4 no later than **April 21, 2017**.

5 (3) If plaintiff timely files a brief and/or explains why she failed  
6 to follow the scheduling order, the Acting Commissioner shall file a  
7 response by **May 12, 2017**.

8 (4) If plaintiff does not file an opening brief and does not  
9 explain adequately why she failed to follow the scheduling order, the  
10 Court will file a Report and Recommendation, recommending that the  
11 case be dismissed.

12 . . .

13 The Court directs plaintiff to the Court's website, which includes  
14 information for *pro se* litigants, such as the *Pro Se* Guide to Filing Your  
15 Lawsuit in Federal Court, which includes resources for potentially finding  
16 legal advice: <http://www.wawd.uscourts.gov/representing-yourself-pro-se>  
17 (last visited April 4, 2017). See "*Resources That May Help You*" located  
18 at *Pro Se* Guide, pp. 35-37.

19 Dkt. 16, pp. 3-4.

## 20 DISCUSSION

21 The Court was not willing to risk dismissal of an action before consideration of the  
22 merits when "other less drastic alternatives [we]re [] available," in part, due to plaintiff's  
23 *pro se* status. See *Eldridge v. Block*, 832 F.2d 1132, 1137 (9th Cir. 1987) (citing *Nevijel*  
24 *v. North Coast Life Ins. Co.*, 651 F.2d 671, 674 (1981)). The Court provided notice to  
plaintiff that this Court would recommend that this matter be dismissed for lack of  
prosecution if plaintiff failed to follow the Court's order and file an opening brief. Dkt.  
16. The plaintiff has failed to prosecute this case. Local Civil Rule 11(c); see, also Fed.  
R. Civ. P. 41(b).

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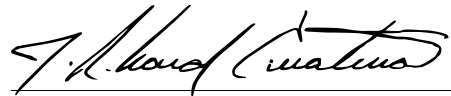
1 CONCLUSION

2 As plaintiff failed to abide by this Court's order to file an opening brief or show  
3 cause why this matter should not be dismissed, the undersigned recommends that this  
4 matter be dismissed without prejudice for lack of prosecution and that the case be closed.

5 Pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b), the parties shall have  
6 fourteen (14) days from service of this Report to file written objections. *See also* Fed. R.  
7 Civ. P. 6. Failure to file objections will result in a waiver of those objections for  
8 purposes of *de novo* review by the district judge. *See* 28 U.S.C. § 636(b)(1)(C).

9 Accommodating the time limit imposed by Rule 72(b), the clerk is directed to set the  
10 matter for consideration on **June 2, 2017**, as noted in the caption and mail a copy of the  
11 Report and Recommendation to pro se plaintiff at her last known address.  
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13 Dated this 3rd day of May, 2017.

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15 J. Richard Creatura  
16 United States Magistrate Judge  
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